

TO: All Parties to Fiber Technologies Networks, L.L.C., D.T.E. 01-70
FROM: Robert J. Howley, Hearing Officer
DATE: February 14, 2002
RE: Ruling on Motion to Compel
CC: Mary Cottrell, Secretary
Commission

HEARING OFFICER'S RULING ON FIBER TECHNOLOGIES NETWORKS, L.L.C.
MOTION TO COMPEL DISCOVERY RESPONSES BY
SHREWSBURY'S ELECTRIC LIGHT PLANT

I. INTRODUCTION

On November 28, 2001, Fiber Technologies Networks, L.L.C. ("Fibertech") filed with the Department of Telecommunications and Energy ("Department") a Motion to Compel Discovery ("Fibertech Motion") regarding Shrewsbury's Electric Light Plant's ("SELP") responses to four of Fibertech's Information Requests. On January 25, 2002, SELP filed an opposition to the Fibertech Motion ("Opposition").

II. FIBERTECH'S MOTION TO COMPEL

Fibertech requests that the Department order SELP to provide complete responses to four Information Requests issued on October 29, 2001 and November 13, 2001. Fibertech seeks the production of legal opinions, including any legal research for the opinion, rendered to SELP about whether to allow Fibertech access to SELP's poles (FIBERTECH 2-1, 2-2, 3-4, 3-9). Fibertech argues that the information sought is necessary because it goes to the basis of SELP's denial of access to its poles and is not available from any other source (Fibertech Motion at 11). According to Fibertech, SELP must produce the requested information under G.L. c. 66, § 10 ("the Public Records Act") (*id.* at 6). Fibertech also argues that SELP must

produce the requested information because SELP has waived any attorney-client privilege by voluntarily disclosing the legal opinion of its counsel to a third party, the Town of Shrewsbury. Finally, Fibertech argues that SELP has waived any attorney-client privilege because SELP has placed the “advice of counsel” at issue in this proceeding (id. at 8, 10).

III. SELP’S OPPOSITION

SELP provides several grounds for not producing the requested legal opinions. First, SELP argues that the documents cannot be obtained under the Public Records Act (Opposition at 3). SELP states that Fibertech has never made a public records request for their legal opinion (id.). SELP argues that even if Fibertech had made a public records request, the Department has no jurisdiction to resolve a public records dispute (id. at 4). Second, with respect to Fibertech’s position that SELP has waived its attorney-client privilege by disclosing its legal opinion to officials within the Town of Shrewsbury, SELP argues that while the Town of Shrewsbury is a distinct operational and financial entity from SELP, the Town of Shrewsbury owns SELP and thus the legal opinion provided to SELP was transmitted to the Town of Shrewsbury as part of an inter-agency memoranda (id. at 5). Finally, SELP states that it has not relied upon nor placed at issue an “advice of counsel” defense in denying Fibertech access to its poles (id. at 6-7).

IV. ANALYSIS AND FINDINGS

With respect to discovery (i.e., information requests), the Department’s regulations provide:

The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled. 220 C.M.R. § 1.06(6)(c)1.

Hearing officers have discretion in establishing discovery procedures and are guided, but not bound, in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq. 220 C.M.R. § 1.06(6)(c)2. Rule 26 provides that:

Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action.... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Mass. R. Civ. P. 26(b).

Fibertech seeks information from SELP involving the production of legal opinions regarding its request for access to SELP's poles. Fibertech states that SELP must produce the requested information under the Public Records Act and because SELP has waived its attorney-client privilege. SELP, however, argues that it has not waived this privilege.

State agencies are not required to follow formal judicial rules of evidence but agencies must "observe the rules of privilege recognized by law." G.L. c. 30A, § 11(2). Where confidential communications have been rendered between an attorney and a person seeking to obtain a legal opinion, an attorney-client relationship exists.¹ The attorney-client privilege attaches to any communication made between an attorney and client in private, for the purpose of obtaining or providing legal counsel. In Re Reorganization of Electric Mutual Liability Ins. Co., Ltd., 425 Mass. 419, 421 (1997). The privilege against disclosure of confidential communications between the attorney and the client may be waived solely by the client.² Here, SELP received a confidential legal opinion from its attorneys regarding public ways and Fibertech's request to access its poles. This legal opinion fits squarely within the rules of privilege under Massachusetts law.

Fibertech argues that SELP waived its attorney-client privilege by sharing its legal opinion with a third party. Communications intended to be transmitted to others are not privileged.³ Fibertech cites Peters v. Wallach, 366 Mass. 622 (1975) for the proposition that communications between an attorney and client are not privileged where it is understood that the information communicated is to be conveyed to other individuals. However, there is a presumption in favor of preserving the attorney-client privilege and sharing attorney-client information is not an automatic waiver of that privilege. Dedham-Westwood Water District v. National Union Fire Insurance Co. of Pittsburgh, No. Civ. A. 96-00044, 2000 Mass. Super. LEXIS 31, at *11 (Mass. Super. February 15, 2000) (shielding investigative reports from discovery pursuant to the attorney-client privilege even though these reports were disclosed to interested individuals associated with the client). While SELP acknowledges that it disclosed its legal opinion with officials from the Town of Shrewsbury, SELP transmitted this opinion to the Town as part of an inter-agency memoranda regarding policy positions about the use of public ways. Therefore, because there is no evidence that SELP's counsel prepared the legal opinion with the understanding that it would be communicated to the public or that SELP disclosed its legal opinion to anyone other than an associated interested party, I find that SELP has not

¹ Alexander J. Cella, Administrative Law and Practice, Massachusetts Practice Series, Vol. 38 § 286 (1986).

² Alexander J. Cella, Administrative Law and Practice, Massachusetts Practice Series, Vol. 38 § 286 (1986) citing Kenneth B. Hughes, Evidence, Massachusetts Practice Series, Vol. 19 § 166 (1961).

³ Paul J. Liacos, Handbook of Massachusetts Evidence, 730 (6th ed. 1994).

waived its attorney-client privilege. Further, I find that SELP has not sought to make this legal opinion an issue in this matter by introducing any privileged documents concerning its attorneys' opinions or by raising an "advice of counsel" defense in denying Fibertech access to its poles.

While Fibertech argues that SELP's legal opinion must be produced under the Public Records Act, Fibertech has never made a public records request of SELP or the Town of Shrewsbury. Assuming Fibertech had made a public records request and was denied, the Supervisor of Public Records, not the Department, adjudicates public records disputes. G.L. c. 4, § 7(26). Therefore, after due consideration, I deny Fibertech's Motion to Compel Discovery responses to Information Requests FIBERTECH 2-1, 2-2, 3-4 and 3-9.

Under the provision of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by Tuesday, February 19, 2002, at 5:00 p.m. A copy of this Ruling must accompany any appeal. Any response to any appeal must be filed by 5:00 p.m. Thursday, February 21, 2002.